Supreme Court, U.S.
FILED

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

GARY L. ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an aircraft launched from a ship on navigable waters causing injury on land is an appurtenance of the ship for purposes of establishing admiralty jurisdiction under the Extension of Admiralty Jurisdiction Act.

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OPINIONS BELOW

The opinion in this case issued by United States Court of Appeals for the Eleventh Circuit is reported at 317 F.3d 1235 (2003). The opinion of the United States District Court for the Middle District of Florida has not been published in the Federal Supplement, but appears at 2002 A.M.C. 2501.

JURISDICTION

The Eleventh Circuit filed its decision and entered judgment on January 7, 2003. This Court has jurisdiction to review the circuit court's decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2680(d)

The provisions of this chapter [Federal Tort Claims Act] and section 1346(b) of this title shall not apply to—

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

46 U.S.C. app § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. In any such case suit may be brought

in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE AND FACTS

Petitioner, Gary L. Andersen,[1] seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal with prejudice of his complaint by the United States District Court for the Middle District of Florida. The district court dismissed his complaint on the grounds that, because he was injured on land by an appurtenance of a vessel on navigable waters, his claim arose in admiralty rather than the Federal Tort Claims Act, 28 U.S.C. § 2680(d) ("FTCA"), and he failed to meet the jurisdictional requirements under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. app. § 740 ("EAJA"). Andersen appealed the final order of the district court to the Eleventh Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Eleventh Circuit affirmed the decision of the district court.

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[1] Although the caption in the lower courts read "Gary L. Anderson," the correct spelling of his name as "Andersen" will be used in this petition.

Andersen, a civilian employee of a government contractor working at the Cerro Matias Observation Post, was seriously injured when an aircraft launched from the USS *John F. Kennedy* ("the *Kennedy*"), a vessel on navigable waters, released two bombs that missed their intended target and impacted at the observation post. Andersen filed suit under the FTCA and alternatively under the Suits in Admiralty Act (46 U.S.C. app. § 741-752), the Public Vessels Act (46 U.S.C. app. § 781-790), and the EAJA. Andersen contended that his claim arose under the FTCA rather than in admiralty, because his injury occurred on land and neither the aircraft nor the bombs were an appurtenance of the *Kennedy*, ,and that the injury was the result of the negligence of the land-based Range Control Officer. Andersen also filed a written claim with the Naval Legal Services Office, but that office denied the claim as outside the time limit in which to file an admiralty claim.

Andersen contended that the United States was negligent in failing to provide a safe work environment and that the land-based range control officer negligently authorized the release of the bombs outside the target range. The district court found that the aircraft was an appurtenance of the *Kennedy* because it was assigned and attached to the vessel and operated from the vessel. The Eleventh Circuit held that the aircraft, which caused the injuries to Andersen, was an appurtenance to the *Kennedy* because it was specifically assigned to the *Kennedy* and was carrying out the mission of the *Kennedy* at the time the injuries occurred.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD CLARIFY THE INCONSISTENT DEFINITIONS OF "APPURTENANCE" AMONG FEDERAL COURTS, WHICH HAVE BEEN FURTHER CONFUSED BY THE RECENT DECISION OF THE ELEVENTH CIRCUIT.

The Court attempted to formulate a bright-line test for determining whether an injury on land is caused by an appurtenance of a vessel on navigable waters in *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1972). The lower federal courts, however, have failed to apply this definition in a consistent manner, resulting in a wide variety of items considered appurtenant to a vessel. *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001), *quoting* 1 Schoenbaum, *Admiralty and Maritime Law* §9-1, at 489 (2d ed. 1994) (the determination of whether an item is an appurtenance "is commonly made on a case-by-case basis without great consistency of results.") The definition of appurtenance and its inconsistent application are important questions of federal law that this Court should clarify.

In *Victory Carriers*, the Court set forth four factors for determining whether an action will arise in admiralty. The typical elements of a maritime cause of action are satisfied where (1) the equipment causing the injury is part of the ship's usual gear or is stored on board; (2) where the equipment causing the injury is attached to the ship, (3) where the equipment causing the injury is under the control of the ship or its crew; or (4) where the accident occurred aboard ship or on the gangplank. *Victory Carriers*, 404 U.S. at 213-14. The Court held that admiralty jurisdiction did not apply, because the operation of a forklift on land did not satisfy any of these factors, even though the operator was moving cargo to be loaded aboard a vessel. The Court noted that the congressional purpose in enacting the EAJA was to provide a

remedy for cases in which a person on land was directly injured by a vessel through collision or other accident. *Victory Carriers*, 404 U.S. at 210. The Court declined "to extend shoreward the reach of the maritime law further than Congress has approved" and displace an area traditionally governed by state law. *Victory Carriers*, 404 U.S. at 211-12.

The first three *Victory Carriers* factors address equipment, while the fourth addresses the location where the injury occurred. Although the first three factors seem to indicate whether an item of equipment is appurtentant to a vessel, other courts have applied those factors with widely varying results. For instance, in *J.R. Davis v. W. Bruns & Co.*, 476 F.2d 246 (5th Cir. 1973), the plaintiff was injured while unloading banana boxes from a ship using gantries placed in the holds of the ship. Relying on *Victory Carriers*, the court held that none of the elements required by maritime jurisdiction were present in that case. Although the plaintiff contended that the case arose in admiralty because the equipment that injured him was attached to the ship, the court declined to accept this argument and found that the wires connected to the ship were not sufficiently attached to confer admiralty jurisdiction. The equipment they were using to unload the banana boxes was permanently affixed to the shore and was not an appurtenance of the ship. The plaintiff also argued that since the controls for the gantry were in the hold of the vessel, the ship had control of the equipment that caused plaintiff's injuries. The court also disagreed with this argument and found that the equipment was controlled from shore.

In *Garrett v. Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974), a longshoreman unloading a vessel on a pier sued the ship owner for injuries he sustained while unloading bales of paper from a ship and stacking them in a shed about twenty-five feet from the side of the ship. Plaintiff claimed that his injuries were caused by the unseaworthiness of the vessel and the negligence of the ship's crew because the bales of paper had been improperly secured in the ship's hold during travel.

The court noted the confusion concerning the right to recover under maritime law and the restrictions that apply to maritime jurisdiction. Relying on *Victory Carriers* for the definition of appurtenance, the court held that the case arose in admiralty because the instrumentality of the injury was the ship's cargo container, in the form of the wire bands around the bales. *Garrett* 491 F.2d at 232. The court also noted that once the cargo was accepted the shipowner would be responsible for any injury caused by a defective condition in the containers, regardless of whether the injury occurred on board the vessel or on the dock. *Garrett*, 491 F.2d at 232-33.

In *Mascuilli v. American Export Isbrandtsen Lines, Inc.*, 381 F.Supp. 770 (E.D. Pa. 1974), a longshoreman was injured when he was struck by dunnage that was negligently banded and slipped off a forklift truck being driven by plaintiff's co-worker during cargo operations. The dunnage had been removed from the ship, piled on the pier, and then moved out of the way by plaintiff's co-worker. In analyzing whether the dunnage was an appurtenance under *Victory Carriers*, the court found that the dunnage was part of the ship's usual gear, and thus satisfied the first factor. *Mascuilli*, 381 F. Supp. at 775. The court noted, however, that the dunnage was not attached to the ship or under the control of the ship or its crew, and thus held that the plaintiff's injury was not caused by a vessel on navigable water for purposes of the EAJA. *Mascuilli*, 381 F. Supp. at 775. The *Mascuilli* court also took note of the admonition of this Court to "proceed with caution" in expanding admiralty jurisdiction, adding that lower court judges should exercise even greater caution in expanding admiralty jurisdiction. *Mascuilli*, 381 F. Supp. at 775-76, *quoting Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

Further attempts to refine the definition have resulted in a similar broad array of items considered appurtenant to a vessel. For instance, in *Kinsella v. Zim Israel Navigation Co.*, 513 F.2d 701 (1st Cir. 1975), plywood that had been appurtenant to a ship at one point in time lost its character as

such at the time of the injury to the plaintiff, when it was not being used for its usual function in the hold but had been set aside to facilitate cargo unloading. The court in *Kinsella* specifically noted that an item that may be an appurtenance for some purposes at some times does not hold that character indefinitely. *Kinsella*, 513 F.2d at 704. In *Gowen*, fishing permits, even though intangible, were appurtenant to a vessel because they were "'essential to the vessel's navigation, operation, or mission.'" *Gowen*, 244 F.3d at 67, *quoting Gonzalez v. M/V Destiny Panama*, 102 F.Supp.2d 1352, 1356 (S.D.Fla. 2000). In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), a crane attached to a barge was an appurtenance of the barge, while in *Watson v. Massman Construction Co.*, 850 F.2d 219 (5th Cir. 1988), a compressor situated on a barge was not an appurtenance of the barge. *Compare Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767 (11th Cir. 1984) (air compressor damaged aboard a vessel was no longer appurtenant to the vessel when it injured a worker while being unloaded on land).

Perhaps the most far-reaching extension of admiralty jurisdiction was applied by the Eighth Circuit in *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251 (8th Cir. 1980). In that case, the plaintiff was struck by a car on land whose driver had become intoxicated on a privately chartered cruise. The court held that the plaintiff's action arose in admiralty because the negligence alleged, that of the cruise line's failure to adequately supervise its passengers, occurred on a vessel on navigable waters. *Duluth Superior Excursions*, 623 F.2d at 1253.

The decision of the Eleventh Circuit in *Anderson v. United States*, 317 F.3d 1235 (11th Cir. 2003) provides further confusion by holding that an aircraft releasing bombs on land is an appurtenance of the vessel from which it was launched. While in *Anderson* an aircraft and its bombs were considered appurtenant to a vessel on navigable waters even after being removed from the vessel, in *Scott v. MGI America, Inc.*, 2001 WL 185477 (N.D. Ill.), the court held that a life

raft that is part of the usual gear of a vessel but at the time of the injury was removed from the water, inspected, repackaged and being driven back to the vessel was not an appurtenance. The "substantial confusion in the lower courts" noted by the Court in *Victory Carriers* still exists, creating more results that "are impossible to rationalize." *Victory Carriers*, 404 U.S. at 214 n. 14. Therefore, this Court should revisit and further refine the factors for determining whether an item causing injury is appurtenant to a vessel on navigable waters.

CONCLUSION

Because of the confusion among the lower federal courts regarding the definition of an appurtenance, this Court should grant the petition for writ of certiorari and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-14258
Non-Argument Calendar

D.C. Docket No. 01-00422-CV-3-J-21HT

GARY L. ANDERSON,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(January 7, 2003)

Before ANDERSON, BLACK AND WILSON, Circuit Judges.

PER CURIAM:

Gary L. Anderson[1] appeals the district court's order dismissing his complaint with prejudice. He asserts that (1)

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[1] The official caption of this case lists Gary L. Anderson as the plaintiff. We note, however, that the plaintiff identifies himself as Gary W. Andersen.

his claim against the United States did not arise in admiralty and thus was properly brought under the Federal Tort Claims Act (FTCA); and (2) even if his claim arose in admiralty, his failure to comply with the jurisdictional requirements of the Extension of Admiralty Jurisdiction Act (EAJA) should not be fatal to his claim. For the reasons set forth below, we affirm.

BACKGROUND

Anderson is a civilian employee of ITT Federal Services Corp., a contractor of the United States. ITT is located at the Cerro Matias Observation Post at the Atlantic Fleet Weapons Training Facility (AFWTF). On April 19, 1999, the USS John F. Kennedy launched an armed F/A-18C aircraft while conducting a training exercise at Vieques Island, Puerto Rico. The aircraft released two bombs aimed at the AFWTF range. The bombs missed the intended target and impacted near the Cerro Matias Observation Post on the AFWTF range, thereby injuring Anderson.

On March 21, 2001, Anderson submitted a written claim seeking damages for his injuries with the Naval Legal Services Office, Mid-Atlantic. The claim was denied on April 10, 2001. Thereafter, on April 18, 2001, Anderson filed a complaint in district court under the FTCA and, alternatively, under the Suits in Admiralty Act (SAA), the Public Vessels Act (PVA), and the EAJA. In each claim, he alleged that the United States negligently failed to provide a safe working environment for him by causing two bombs to be dropped near his work site, and, as a result, he suffered physical and mental injuries. Subsequently, the United States filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), challenging the basis of subject matter jurisdiction, and the district court granted the motion to dismiss with prejudice. This appeal followed.

STANDARD OF REVIEW

We "[u]ndertak[e] a *de novo* review of the district court's dismissal for lack of subject matter jurisdiction." *Ambassador Factors v. Rhein-, Maas-, Und See-Schiffahrtskontor GMBH*, 105 F.3d 1397, 1398 (11th Cir.1997).

DISCUSSION

The United States Constitution authorizes federal courts to hear "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. II, § 2, cl.1. "Congress has embodied that power in a statute giving federal district courts 'original jurisdiction ... of ... [a]ny civil case of admiralty or maritime jurisdiction ... .'" *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995) (alterations in original) (quoting 28 U.S.C. § 1333(1)). Moreover, in 1948 Congress enacted the EAJA, which extends admiralty jurisdiction to "include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. app. § 740. In such cases, however, "the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948." *Id.*

I.

Anderson contends that his claim against the United States did not arise in admiralty, and, therefore, it was proper under the FTCA. The FTCA's waiver of sovereign immunity excludes "[a]ny claim for which a remedy is provided by [the PVA or SSA], relating to claims or suits in admiralty against the United States." 28 U.S.C. § 2680(d). Thus, if admiralty jurisdiction exists for Anderson's claim, it cannot be brought

under the FTCA. *See id.*

To determine whether a claim falls under admiralty jurisdiction, the United States Supreme Court enunciated two tests, which address the location where the injury occurred and the incident's connection to maritime activity. *Jerome B. Grubart, Inc.*, 513 U.S. at 534.

> [Under] the location test[, a court] must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water.... [Under the connection test, a] court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.

Id. (citations omitted) (internal quotation marks omitted). We turn first to the issue of location.

A.

To satisfy the location test, we must determine whether the injuries Anderson suffered were caused by the Kennedy. *See id.*[2] As stated earlier, the aircraft, which was stored on the Kennedy, released the bombs that injured Anderson. "[M]aritime law ... ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself." *Id.* at 535; *see also Victory Carriers, Inc. v. Law*, 404 U.S.202, 210-11 (1971) (finding admiralty jurisdiction for injuries "caused by an appurtenance of a ship"). Therefore, we must determine whether the aircraft is an appurtenance to the Kennedy.

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[2] Neither party disputes that the injuries alleged herein occurred on land.

To determine whether an item is an appurtenance to a vessel, we "must look to the relation [it] bear[s] to the actual service of the vessel." *In re Frolic*, 148 F.921, 922 (D.R.I. 1906) (internal quotation marks omitted). The Southern District of Florida recently defined an appurtenance as "any specifically identifiable item that is destined for use aboard a specifically identifiable vessel and is essential to the vessel's navigation, operation, or mission." *Gonzalez v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1354-57 (S.D. Fla. 2000) (discussing cases dealing with appurtenances); *see also United States v. Dewey*, 188 U.S. 254, 268 (1903) (finding that the words " 'ship or vessel of war' include[ ] her armament ... [and] everything ... on board the ship in aid of her operations"); *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 67-71 (1st Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 196 (2001) (finding that fishing permits were appurtenances to a vessel because they were essential to the vessel's purpose).

Neither party disputes that the aircraft was on a mission to bomb targets on the AFWTF range. Moreover, in his declaration, Captain Clay Sayers of the United States Navy maintained that the aircraft was assigned to the Kennedy[3] and that its operations were controlled by personnel aboard the Kennedy at all times. Captain Sayers also declared that "[e]mbarked aircraft and their ordnance are the carrier's primary offensive and defensive weapons.... The aircraft are an extension of the ship's ears (electronic monitoring), eyes (surveillance), and provide offensive and defensive capability (air-to-air combat and air-to-ground strike)." Thus, the aircraft was assigned to the Kennedy, specifically, and, when conducting the bombing exercises, the aircraft was carrying out the Kennedy's mission by testing its offensive and defensive capabilities in air-to-ground strikes. Accordingly, we find that the aircraft was an appurtenance to

[3] Anderson did not counter this evidence.

the Kennedy at the time of Anderson's injuries.[4] As injuries caused by an appurtenance to a vessel are deemed to have been caused by the vessel, *Jerome B. Grubart, Inc.*, 513 U.S. at 535, the location test is satisfied.

B.

To satisfy the connection test, we first must determine "whether the incident involved ... [has] the potential to disrupt maritime commerce." *Id.* at 538. The AFWTF range closes twice weekly to allow fishing vessels to gather their catch. Thus, the bombing activities at the AFWTF range have the potential to disrupt maritime commerce.

Next, we "must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* at 534. The "[n]avigation of boats in navigable waters" establishes a substantial relationship to traditional maritime activity. *Id.* at 540. The Kennedy's activities include navigating the world's navigable waters and managing flight operations involving aircraft armed with ordnance to be

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[4] Anderson asserts that if the aircraft was an appurtenance when it was aboard the Kennedy, it ceased to be an appurtenance upon leaving the Kennedy. *See Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 768-69 (11th Cir. 1984) (concluding that an air compressor that was damaged aboard a vessel was not an appurtenance when it injured a worker while it was being unloaded on land); *Kinsella v. Zim Isr. Navigation Co.*, 513 F.2d 701, 702-04 (1st Cir. 1975) (holding that plywood used as dunnage to separate cargo on a vessel lost its character as an appurtenance after it was removed from the vessel and placed over the railroad by shore-based workers); *Miller v. A/B Svenska Amerika Linien*, 454 F.2d 1094, 1095-96 (3d Cir. 1971) (finding that a water bucket used for drinking was no longer an appurtenance when it was removed from the vessel and leaked, resulting in a puddle that caused an injury on land). Unlike in those cases, when Anderson's injuries occurred, the aircraft still was carrying out the Kennedy's mission. Thus, we find that the aircraft was an appurtenance when it released the bombs and injured Anderson.

launched at sea. Thus, the connection test is satisfied. *See id.*[5]

Anderson's injuries were caused by the Kennedy and were connected to maritime activity. Accordingly, his claim arose in admiralty and cannot be brought under the FTCA. *See* 28 U.S.C. § 2680(d).

II.

Anderson filed his remaining negligence claims in admiralty under the PVA and the SAA, both of which have a two year statute of limitations, and the EAJA. *See Wilson v. United States Gov't*, 23 F.3d 559, 561 (1st Cir. 1994) ("Causes of action under both [the PVA and the SAA] may be brought only within two years after the cause of action arises" (internal quotation marks omitted).)[6] To bring suit under these acts, a plaintiff must comply with the EAJA's jurisdictional requirements by (1) filing an administrative claim with the "[f]ederal agency owning or operating the vessel causing the injury or damage"; and (2) waiting six months after filing an administrative claim to file suit against the United States. *See* 46 U.S.C. app. § 740; *see also Turner Terminals, Inc. v.*

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[5] Anderson also contends that the proximate cause of his injuries was the unsafe working environment created by the United States, the negligence of the Range Control Officer, and the negligence of the pilot. Moreover, he contends that "the *Kennedy* was nothing more than a 'fortuitous but-for' cause of [his] injuries and was not the proximate cause." Initial Br. of Appellant at 18. Assuming arguendo that these acts contributed to Anderson's injuries, "as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will 'involve' ... traditional maritime activity and will meet the second nexus prong." *Jerome B. Grubart, Inc.*, 513 U.S. at 541. As we find that the Kennedy was engaged in traditional maritime activity, we need not address Anderson's alternative arguments.

[6] The distinctions between the SAA and the PVA are not relevant to this appeal, because both "apply when a plaintiff brings a public-vessel-related suit in admiralty against the United States" and both require that a plaintiff abide by the EAJA's jurisdictional requirements. *Justice v. United States*, 6 F.3d 1474, 1475 (11th Cir. 1993).

United States, 177 F.2d 844, 846 (5th Cir. 1949) (providing that the requirement that a claim be presented to the responsible federal agency six months before filing suit is jurisdictional).[7] In effect, the six-month requirement reduces the two-year statute of limitations to eighteen months, because the plaintiff must wait six months, but still file suit within two years. *Loeber v. Bay Tankers, Inc.*, 924 F.2d 1340, 1343 (5th Cir. 1991) (per curiam).

Anderson filed his administrative claim with the United States in March of 2001, which was twenty-three months after the incident occurred and within the two-year statute of limitations. On April 10, 2001, the United States denied Anderson's claim. Subsequently, on April 18, 2001, less than one month after filing his administrative claim, but still within the two-year statute of limitations, Anderson filed suit in district court. Anderson contends that he followed the spirit of the law, if not the letter of the law, by filing his administrative claim within the statute of limitations and awaiting the government's denial before filing suit. Thus, he contends that his failure to comply strictly with the EAJA's filing requirements should not be fatal to his claim.

Anderson's argument mirrors the plaintiff's argument in *Pacific Bell v. United States*, 636 F.Supp. 312 (N.D.Cal. 1986). In that case, the plaintiff filed an administrative claim within the two-year statute of limitations, received a denial less than two months later, and immediately filed suit. *Id.* at 313. Like Anderson, the plaintiff alleged that the six-month waiting period was impractical once the claim was denied and therefore should be ignored in such instances. *Id.* The court disagreed and granted the defendant's motion for summary judgment. *Id.* at 316.

Specifically, the court in *Pacific Bell* found "no language in ... section [740 of the EAJA] even suggesting that

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[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

the waiting period does not apply once a denial of a claim has occurred." *Id.* at 314. Moreover, the court found that "[t]he interrelationship between the waiting period and the limitation period is ... consistent as the two year period merely provides an outside limit within which the action may be maintained and does not preclude the application of shorter limitation periods where appropriate." *Id.* (citations omitted) (internal quotation marks omitted). Thus, the court strictly construed the EAJA's jurisdictional requirements. *Id.* at 314-15.

We are persuaded by the reasoning in *Pacific Bell.* Thus, we find that the district court properly granted the United States's motion to dismiss with prejudice.

CONCLUSION

Accordingly, we AFFIRM the district court's dismissal of Anderson's complaint with prejudice.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GARY L. ANDERSON,

Plaintiff,

v. CASE NO. 3:01-CV-422-J-21-HTS

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

Filed herein is Defendant's Motion to Dismiss (Dkt. 4), Plaintiff's response in opposition thereto (Dkt. 7), and Defendant's reply (Dkt. 16).

I. GENERAL BACKGROUND

In this matter, Plaintiff, Gary L. Anderson[1], a civilian, sues Defendant, United States of America, for injuries caused when an FA-18C military aircraft--which was launched from the aircraft carrier, USS John F. Kennedy ("Kennedy")--released two bombs during a training exercise at Vieques Island, Puerto Rico on April 19, 1999. The bombs missed their intended target on the bombing range and, instead, impacted near the Cerro Matias Observation Post at the Atlantic Fleet Weapons Training Facility where Plaintiff was

[1] Plaintiff's name in the caption of the Complaint (Dkt.1) appears to be inaccurate according to his Affidavit (Dkt. 7, Exh. A) wherein Plaintiff is identified as Gary W. Andersen.

working for a civilian contractor. As a result, Plaintiff incurred the injuries giving rise to this lawsuit.

Plaintiff alleges Defendant was negligent in the bombing incident. First, because Defendant failed to provide adequate physical protection on the ground for personnel working in the Cerro Matias Observation Post despite a number of recent "close calls" prior to the incident giving rise to this lawsuit. Additionally, Plaintiff claims that the pilot of the aircraft was negligent in releasing the bombs because he failed to visually sight his proper target before releasing the ordnance. Last, Plaintiff alleges that the Range Control Officer ("RCO"), who is on the ground at the bombing range, acted negligently because he violated regulations by authorizing the bombs' release before he visually sighted the aircraft.

Approximately twenty-three months after the bombing incident, on March 21, 2001, Plaintiff filed a claim with the Naval Legal Services Office, Mid-Atlantic, Norfolk, VA, ("NLSO"), which was denied on April 10, 2001. Thereafter, on April 18, 2001, Plaintiff filed this lawsuit. Plaintiff's first count is brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"). Alternatively, and only if the FTCA is inapplicable, Plaintiff pleads three counts: Count II under the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-752 ("SAA"); Count III under the Public Vessels Act, 46 U.S.C. app. §§ 781-790 ("PVA"); and Count IV under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. app. § 740 ("EAJA").

The allegations relied upon in each of the four claims is the same: (1) the United States owed a duty to Plaintiff to refrain from inflicting harm or injury to him; (2) the United States breached that duty to Plaintiff by negligently failing to provide Plaintiff a safe work environment and by negligently causing two bombs to be dropped from a military aircraft onto Plaintiff's work site; and (3) as a result of such breach, Plaintiff suffered physical and mental injuries. (Dkt. 1).

Defendant filed this Motion to Dismiss under Rule 12(b)(1), Federal Rules of Civil Procedure, arguing that Plaintiff's Complaint must be dismissed with prejudice because this Court lacks subject matter jurisdiction over Plaintiff's lawsuit because Plaintiff did not comply with pre-suit requirements.

II. RULE 12(b)(1) MOTION TO DISMISS STANDARD

Because this Motion to Dismiss is before the Court under Rule 12(b)(1), the Plaintiff's allegations are not presumed to be true. As the Eleventh Circuit explained:

> Attacks on subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) come in two forms. "**Facial attacks**" on the complaint "require[ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.), cert. denied, 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). "**Factual attacks**," on the other hand, challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." Id.
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> These two forms of attack differ substantially. On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion--the court must consider the allegations of the complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981). But when the attack is factual, the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56.

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Id. at 412-13 (quoting Mortensen, 549 F.2d at 891).

Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (emphasis added). Explained another way,

> a Rule 12(b)(1) motion can serve either purpose. If it simply challenges the sufficiency of the allegations of subject matter jurisdiction, then the pleading's contents are taken as true for purposes of the motion. However, if it challenges the actual existence of subject matter jurisdiction, then the pleading's allegations are merely evidence on the issue. Since the party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction regardless of the pleading's allegations, the courts have held that the pleader must establish jurisdiction with evidence from other sources, such as affidavits or depositions. The general rule, therefore, is that a pleading's allegations of jurisdiction are taken as true unless denied or controverted by the movant. Thus, if the movant fails to contradict the pleader's allegation of subject matter jurisdiction in his motion to dismiss under Rule 12(b)(1), then he is presumed to be challenging the pleading's sufficiency under Rule 8(a)(1), and the allegations of the pleading pertaining to jurisdiction are taken as true. But if the movant,

> either in his motion or in any supporting materials, denies or controverts the pleader's allegations of jurisdiction, then he is deemed to be challenging the actual existence of subject matter jurisdiction, and the allegations of the complaint are not controlling.
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> The court will not accept as true allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading. On the other hand, the allegations of the pleading will be supplemented by any relevant matter that can be judicially noticed or by the contents of any exhibits attached to the pleading or any matter validly incorporated by reference.

5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1363 (2d e.1990).

When Defendant has challenged jurisdiction, the burden of proving that this Court has subject matter jurisdiction over this claim remains upon Plaintiff. Id. at § 1350. Plaintiff may rebut Defendant's assertion by providing the Court with evidence that jurisdiction is proper and that the claim is not frivolous. Id. In determining whether jurisdiction is proper, the Court must weigh the merits of what is presented by the parties. Id. The Court is free to review and weigh the evidence presented by both parties that is outside the four corners of the complaint. The Court, having reviewed both the arguments and evidence presented by both parties, determines that this Motion to Dismiss challenges the basis of subject matter jurisdiction and, as such, is a factual challenge.

III. PARTIES' ARGUMENT ON THE MOTION TO DISMISS

Defendant seeks dismissal of Plaintiff's first count, brought under the FTCA, because the waiver of sovereign immunity granted by the FTCA does not encompass "[a]ny claim for which a remedy is provided by [the PVA or SAA] relating to claims or suits in admiralty against the United States" 28 U.S.C. § 2680(d). Defendant further cites to the EAJA, which extends admiralty jurisdiction to claims such as those in this case, wherein it provides:

> [A]s to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 ....

46 U.S.C. app. § 740. Consequently, Defendant argues that because Plaintiff's claim is required to be brought under the PVA or SAA, it may not be raised under the FTCA.

With regard to Plaintiff's three additional alternative admiralty counts, Defendant asserts that these counts must be dismissed as time-barred under the EAJA, which Defendant asserts is applicable to this matter. The EAJA provides:

> [N]o suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

Id. Essentially, by requiring a party suing the United States to wait six months after filing a claim in writing, the EAJA cuts short the PVA and SAA's two-year statute of limitations by six months. A party seeking to sue the United States under the PVA or SAA must meet all requirements including filing an administrative claim within the first eighteen months after

such injury occurred or be time-barred from pursuing his or her claim. Therefore, Defendant seeks dismissal of all counts.

Plaintiff asserts that the application of admiralty law is improper; first, because land based bombing does not have a potential to affect maritime activities. Defendant counters this assertion by stating that it routinely publishes notices to mariners "to warn of potential threats to maritime traffic" when conducting "training flight operations in coastal waters." (Dkt. 5, Exh. 2 at ¶ 8). Moreover, Defendant submits the Manual for the Use of the Atlantic Fleet Weapons Training Facility, which provides that the bombing range is closed for two hours per day, two days per week, to "permit local fishermen to retrieve fishing traps from adjacent waters." (Dkt. 16, Exh. 5).

Plaintiff further submits that all negligence was land-based (the RCO's failure to visually sight the aircraft before giving the pilot authorization to drop the bombs) or air-based (the pilot's failure to visually sight the target area before dropping the bombs), but not water-based. As support for his position, Plaintiff submits his own declaration stating that he previously worked for nine years as a RCO at the bombing range on Vieques Island and has worked various additional capacities at the range since 1981; thus Plaintiff is very familiar with the manner in which bombing training operations are conducted at the range. (Dkt. 7, Exh. A at ¶ 1). Plaintiff asserts that all "ordinance [sic] materials utilized during training operations are required to be dropped on land" (Id. at ¶ 4) and that the aircraft was "under the direct and exclusive control of the [RCO] located at the Cerro Matias Observation Post." (Id. at ¶ 6). Furthermore, according to Plaintiff, the RCO improperly allowed the bombs to be dropped in violation of regulations requiring that he "visually sight each aircraft before providing authorization to drop ordinance [sic]." (Id. at ¶ 10).[2] Moreover, Plaintiff asserts that the aircraft involved did not return to the Kennedy, but

[2] Plaintiff did not attach such regulations to his affidavit.

landed at the U.S. Naval Station Roosevelt Roads, Puerto Rico. (Id. at ¶ 13).

Defendant disputes Plaintiff's assertions that the pilot or the RCO controlled the FA-18C military aircraft; rather, Defendant maintains that the aircraft is attached to and is equipment assigned to the Kennedy and was merely operated by the pilot. (Dkt. 5, Exh. 2). The RCO, according to Defendant, does not control aircraft using the bombing range, but only controls the range itself; thus, the RCO's role is limited to communicating that the range is either clear or not clear. (Dkt. 16, Exh. 6). Nevertheless, the "RCO's primary responsibility is safety"; moreover, he is not to let "perceived pressure to complete scheduled operations interfere with safety considerations." (Id., Exh. 4 at ¶ 5) (emphasis omitted).

Defendant further asserts that the aircraft remained under the control of the Kennedy at all times. In support of its assertion, Defendant offers the declaration of Captain Clay Sayers, USN, wherein he declares that the military aircraft involved in the April 19, 1999 incident belonged to Marine Fighter/Attack Squadron Two-Fifty-One, which was assigned to the Kennedy and was, at all times, operationally and administratively controlled by the personnel aboard the Kennedy. (Dkt. 5, Exh. 2; Dkt. 16, Exh. 3). Plaintiff has not countered this evidence that the aircraft was assigned to the Kennedy.

Defendant further maintains that, while the pilot of the aircraft is responsible for the "safe, orderly flight of the aircraft[,]" his mission is set forth before leaving the ship and, unless the safety of the aircraft is affected, cannot be altered except by a "higher authority[.]" (Dkt. 16, Exh. 3). Capt. Sayers also states that the F/A-18C was launched from and, after a delay caused by the bombing incident, was eventually recovered aboard the Kennedy. According to Capt. Sayers, this aircraft and its ordnance are examples of the Kennedy's primary offensive and defensive weapons. Moreover, the

aircraft aboard the Kennedy are "an extension of the ship's ears (electronic monitoring), eyes (surveillance), and provide offensive and defensive capability (air-to-air combat and air-to-ground strike)." (Dkt. 5, Exh. 2 at ¶ 6).

IV. ADMIRALTY JURISDICTION

The Court first turns to Defendant's assertion that this case may not be brought under the FTCA because it is an admiralty action required to be brought under the PVA or SAA.[3] In determining whether this lawsuit falls under admiralty jurisdiction, the Court applies the traditional location and maritime connection tests set forth by the United States Supreme Court in Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995).

> A court applying the location test must determine whether the tort occurred on navigable water or whether injury **suffered on land was caused by a vessel on navigable water.**

Id. (citing EAJA, 46 U.S.C. app. § 740) (emphasis added).

A. Location Test

It is undisputed that the injuries claimed herein were suffered on land, not on navigable water. Therefore, in determining whether admiralty law applies, the Court must determine whether the injuries were caused by the Kennedy, which was a vessel on navigable water, or an appurtenance to

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[3] For purposes of this Motion to Dismiss, the distinctions between the PVA and SAA are irrelevant as both require a plaintiff to abide by the jurisdictional requirements in the AEJA.

the Kennedy.[4] If the FA-18C which dropped the bombs that injured Plaintiff is an appurtenance of the Kennedy, then admiralty law applies.

Neither party has cited, nor has the Court found, authority which directly addresses the issue of whether a military aircraft is an appurtenance of the aircraft carrier to which it is attached. The determination of what is an appurtenance to a ship has long troubled courts.[5]

Nevertheless, a recent decision of the Southern District of Florida provides guidance on the definition of appurtenance. Gonzalez v. M/V Destiny Panama, 102 F.Supp. 2d 1352, 1354-57 (S.D. Fla. 2000) (collecting cases). The Gonzalez court addressed the issue of whether replacement

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[4] It is settled that "maritime law ... ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself." Grubart, 513 U.S. at 535.

[5] In The Frolic, the Rhode Island District Court stated:

> It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are universally so-- things which must be appurtenant to every ship, qua ship, be its occupation what it may. But I think it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship in the particular occupation to which she is destined and in which she is engaged.
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> * * *
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> The word "appurtenances" must not be construed with a mere reference to the abstract naked idea of a ship, for that which would be an encumbrance to a ship one way employed would be an indispensable equipment to another; and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel.

The Frolic, 148 F. 921, 922 (D.R.I. 1906) (internal quotes and citations omitted). The court went on to find that a chronometer, while not usually appurtenant to a schooner, was, nevertheless, an appurtenance in that instance because it was necessary to that particular schooner for a particular purpose on a particular journey.

engines, purchased by the owner of the vessel and stored in a terminal yard within the judicial district, were appurtenances to a vessel which had been arrested for a maritime lien. Prior to the arrest, the engines had been purchased to replace engines which were installed but did not function. The Gonzalez court found that the replacement engines were appurtenances by reviewing case law and determining that "[n]either installation, location, nor ownership is dispositive" of whether an item is an appurtenance. Id. at 1356. The court determined that the item must be "specifically identifiable" and must be "destined for use aboard a specifically identifiable vessel" and, furthermore, must be "essential to the vessel's navigation, operation, or mission." Id. See also United States v. Dewey, 188 U.S. 254, 268 (1903) (finding that a vessel's appurtenances include armament and other equipment which supported the ship's "operations"); Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 67 (1st Cir. 2001) (finding that fishing permits, although intangible, were appurtenances to fishing vessel because essential to vessel's purpose).

The Plaintiff argues that, even if the military aircraft were an appurtenance when embarked upon the Kennedy, it ceased to be an appurtenance upon leaving the Kennedy. As support, Plaintiff cites the following cases for this proposition: Kinsella v. Zim Israel Navigation Co., Ltd., 513 F.2d 701 (1st Cir. 1975) (plywood owned by vessel and used as dunnage to separate cargo during shipping was not appurtenance after being removed from vessel, stored on shore, and subsequently placed over railroad by shore-based workers to facilitate use of a forklift); Crotwell v. Hockman-Lewis, Ltd., 734 F.2d 767 (11th Cir. 1984) (air compressor damaged in hold of vessel by improper packing and later causing injury to a construction worker on land was not an appurtenance after being removed); and Miller v. A/B Svenska America Linien, 454 F.2d 1094 (3rd Cir. 1971) (bucket used for water on board vessel was not an appurtenance after removal when it leaked and the resulting

puddle caused injury on land). The Court finds that these cases are all distinguishable in that the item causing the injury had been used for a particular purpose aboard the vessel and was no longer fulfilling that purpose when it caused the injury giving rise to the lawsuit.

In the instant case, the military aircraft had not been "removed" from the ship by the ship's controllers. Rather, it is clear from a review of the record that the FA-18C was assigned to the Kennedy and was on a mission to bomb land based targets. This mission was initiated specifically on behalf of the Kennedy. The aircraft was not an independent craft, but was assigned, attached to, and operating from the Kennedy.

Based on the undisputed facts in the record, the Court finds that the military aircraft--the FA-18C--was an appurtenance to the Kennedy at the time of the incident. While flying a mission from the Kennedy, the aircraft dropped the bombs which caused the damage to Plaintiff. Damage caused by an appurtenance to a vessel is deemed to have been caused by the vessel. Therefore, the injuries giving rise to this lawsuit were caused by a vessel on navigable waters and thus the maritime location requirement is fulfilled.

B. Maritime Connection Test

With regard to the maritime connection or "nexus" test, the Court must first determine whether "the incident involved was of a sort with the potential to disrupt maritime commerce." Grubart, 513 U.S. at 538. Next, it must determine whether "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." Id.

It is clear from a review of the record that bombing activities at the Vieques bombing range has the potential to significantly disrupt maritime commerce. For example, the

range must close twice weekly for fishing vessels to gather their catch from traps nearby. This incident meets the first prong of the nexus test.

Next, the Court determines that the Kennedy's general activities demonstrate a substantial relationship to traditional maritime activity. For example, the Kennedy's activities--specifically, navigating a carrier in the world's navigable waters and running flight operations in which aircraft armed with ordnance are launched at sea--are clearly sufficient to potentially affect traditional maritime activities. Moreover, even assuming that the RCO or the pilot's acts contributed to the damage sustained to Plaintiff, Grubart makes it clear that the Court need

> look only to whether one of the arguably proximate causes of the incident originated in the maritime activity of a tortfeasor: as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will "involve" such traditional maritime activity and will meet the second nexus prong.

Id. at 541. The involvement of the pilot or RCO is not sufficient to remove this case from the admiralty jurisdiction. The Court finds that the incident herein sufficiently involves traditional maritime activity.

Finding that this is a case arising in admiralty, this lawsuit may not be brought under the FTCA and may be maintained appropriately only as an admiralty case under the PVA or the SAA. Accordingly, Plaintiff's Count I is due to be dismissed.

V. EXTENSION TO ADMIRALTY JURISDICTION ACT ("EAJA")

With regard to Plaintiff's remaining counts in admiralty, in order to bring his suit under either the PVA or the SAA--both

of which have a two-year statute of limitations--Plaintiff must first comply with the jurisdictional requirements under the EAJA for filing suit against the United States. Turner Terminals, Inc. v. United States, 177 F.2d 844, 846 (5th Cir. 1949).[6] (dismissing an action where the plaintiff had failed to first file administrative claim).

The EAJA requires that an administrative claim be filed with the responsible federal agency. Id. Next, the EAJA includes the jurisdictional requirement that the plaintiff wait six months after filing an administrative claim to file a lawsuit. See Rashidi v. Amer. Pres. Lines, 96 F.3d 124 (5th Cir. 1996) (EAJA's requirement that a written claim be presented six months before suit is filed is jurisdictional); Loeber v. Bay Tankers, Inc., 924 F.2d 1340 (5th Cir. 1991) (same); Turner, 177 F.2d at 846 (same); Weatherford v. United States, 957 F. Supp. 830 (M.D. La. 1997) (finding that an administrative claim filed six days before the expiration of the two-year statute of limitations and a lawsuit filed six months after receipt of denial was not sufficient to equitably toll the statute of limitation in the SAA); Pacific Bell v. United States, 636 F. Supp. 312 (N.D. Cal. 1986) (holding plaintiff's claim time-barred under EAJA because it must wait six months after filing administrative claim before filing suit and granting summary judgment); cf. T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir. 1974) (SAA two-year period of limitations is jurisdictional and cannot be tolled). This six-month requirement effectively shortens the two-year statute of limitations to eighteen months because a plaintiff must wait six months, but must still file within two years. Hahn v. United States, 218 F. Supp. 562, 567 (E.D. Va. 1963); Loeber, 924 F.2d at 1343.

Defendant seeks dismissal of Plaintiff's alternative admiralty claims because Plaintiff filed his administrative

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[6] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

claim twenty-three months after the incident and did not await the statutory six months prior to filing suit against the United States. Plaintiff asserts that dismissal of his case would be improper and beyond the purpose and intent of the AEJA. Plaintiff does not dispute that he failed to await the additional six months before filing this lawsuit.

Plaintiff insists that this failure is not relevant because the purpose of the six-month waiting period was to allow the Government time to consider the claim and to avoid unnecessary and expensive litigation. (Dkt. 17 at 14) (citing Carr v. United States, 136 F.Supp. 527 (E.D. Va. 1955); 1948 U.S.Code Cong. Serv., 1898). Moreover, Plaintiff contends that his actions were proper in that he followed the spirit of the law, if not the letter of the law, because he filed his administrative claim and waited for the claim to be denied prior to filing this lawsuit. Plaintiff asserts that, once his claim was denied, he was free to file suit.

Plaintiff attempts to distinguish his case from cases such as Pacific Bell v. United States, 636 F. Supp. at 314-15. In Pacific Bell, a plaintiff claimed that the United States Navy had negligently dropped an anchor on an underwater telephone cable. The plaintiff filed an administrative claim with the Navy twenty-two months after the anchoring incident caused the damage. The Navy denied the claim less than two months later. Immediately upon receipt of the denial notice, the plaintiff filed suit under the SAA. The plaintiff's lawsuit was filed within the SAA's two-year statute of limitations. The plaintiff, however, failed to await the expiration of the six-month period before filing the lawsuit as required by the EAJA.[7] The Navy moved for summary judgment because the plaintiff had failed to meet the jurisdictional requirements of suing the United States under the EAJA. The district court granted summary judgment in favor of the United States.

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[7] The plaintiff in Pacific Bell did not dispute the applicability of the EAJA to its claim, i.e. agreeing that the damage or injury in that case was done or consummated on land. Pacific Bell, 636 F.Supp. at 313.

Plaintiff attacks the reasoning of the Pacific Bell, court stating that court did not provide a well-reasoned opinion on the issue presented and incorrectly relied upon a previous district court case, Hahn v. United States, 218 F.Supp. 562 (E.D. Va. 1963), which addressed the issue of whether the filing of an administrative claim with the federal agency tolled the two-year statute of limitations. Plaintiff states that, in the instant case, he is not seeking a ruling that the statute is tolled; rather, Plaintiff seeks a ruling that, once the NLSO denied his claim, he was free to file suit. Plaintiff reasons that the purpose of the EAJA had been served by putting Defendant on notice and by giving Defendant time to consider the claim before it.

The Court finds that Pacific Bell and the instant case are factually and legally similar and that the reasoning explicated in Pacific Bell is persuasive. The two cases are factually similar in that both plaintiffs claim that the United State Navy negligently caused harm which resulted in damages on land. Both plaintiffs filed administrative claims more than eighteen months after the date of the incident causing the damage, and, then, after the claims were denied, both plaintiffs, although filing their lawsuits before the two-year limitation period in the SAA and PVA, filed such lawsuits less than six months after the filing of their administrative claims--in the case of plaintiff Pacific Bell, two months and in the case of Plaintiff Anderson, four weeks.

The plaintiff's legal arguments in Pacific Bell mirror the arguments set forth herein by Plaintiff Anderson. Both assert that the six-month waiting period should be ignored when the claim has been denied because such waiting period serves no purpose once the claim has been denied. Moreover, both maintain that the government--by denying the claim--clearly had time to consider such claim; therefore the six-month waiting period is not relevant because such waiting period was intended merely to allow the government time to settle claims and avoid litigation. In both cases, the government promptly denied the administrative claim--in less

than two months in Pacific Bell, and in less than one month in the instant case.

As previously stated herein, the EAJA's preclusion of a lawsuit earlier than six months from the presentation to the appropriate federal agency is jurisdictional. E.g. Loeber, 924 F.2d at 1342. Further, as stated in pertinent part by the Pacific Bell court:

> The Hahn court based its holding on general principles of sovereign immunity. It recognized that "[i]t is well settled that when the sovereign consents to be sued, 'the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " [218 F.Supp.] at 565 (quoting United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941).
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> When the language of a waiver of sovereign immunity clearly imposes a condition upon a plaintiff's right to sue the government, a court may not disregard that condition. [The EAJA] unambiguously requires a plaintiff to wait six months after filing a claim before filing suit.
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> [N]othing in the legislative history or the language of the statute suggests that denial of a claim relieves a plaintiff from the six month waiting period, Pacific Bell's argument merely suggests that the Congress should have drafted a narrower provision that would have served the primary purpose of [the EAJA]. With respect to other waivers of sovereign immunity, Congress has indeed drafted narrower provisions. Under the Federal Tort Claims Act, for example, a plaintiff may file suit as soon as the

> relevant agency has denied his or her claim and '[t]he failure of an agency to make a final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim....' 28 U.S.C. § 2675(a) (1976). Nevertheless, it is not the province of this Court to redraft the terms upon which the Congress waives the sovereign immunity of the United States Government.

Pacific Bell, 636 F.Supp. at 314-15.

The Pacific Bell court did not strictly rely on the reasoning in the Hahn case, as Plaintiff asserts, but relied heavily on the language of the EAJA. Finding that the plain language of the statute required the court to find that the plaintiff had failed to meet the requirements of the EAJA, the court determined that it lacked jurisdiction to entertain the lawsuit and entered summary judgment for the defendant. This Court agrees and finds that Defendant is entitled to dismissal as hereinafter provided.

As set forth above, Plaintiff filed his claim with Defendant in March 2001, approximately twenty-three months after the incident occurred. Thereafter, Plaintiff filed this lawsuit in April 2001, less than a month after filing the written claims with Defendant but before the two-year time limitation provided in the PVA and SAA. Nevertheless, Plaintiff failed to meet the requirements of the EAJA by filing his administrative claim within eighteen months of the incident giving rise to this lawsuit. This failure is fatal to his claim. The resulting denial by the NLSO does not operate to waive this requirement for Plaintiff. Thus, Defendant is entitled to the dismissal of Plaintiff's Counts II, III, and IV arising in admiralty.

Although the proper application of the controlling authorities may be severe, nevertheless, the plain language of the EAJA needs no further interpretation and must be complied with strictly for an admiralty case to be maintained

against the United States for damages on land caused by a vessel in navigable water.

VI. CONCLUSION

With regard to dismissing a complaint with prejudice, the general rule in the Eleventh Circuit is that where a 'more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991). Two exceptions exist: (1) where the plaintiff expresses a desire not to amend his or her complaint; and (2) where "a more carefully drafted complaint could not state a claim under the standard of Conley, 355 U.S. at 45-46 ..., dismissal with prejudice is proper." Id. In the instant case, no purpose would be served by allowing Plaintiff to amend his Complaint because it is apparent that even a more carefully drafted complaint would fail to state a claim under the FTCA or the EAJA.

Upon consideration of the foregoing, it is hereby **ORDERED:**

1. Defendant's Motion to Dismiss (Dkt. 4) is **GRANTED** and the Complaint is **DISMISSED with prejudice.**

2. The Clerk is **DIRECTED** to close this case and terminate all pending motions, if any, and delete this case from the roll of pending cases.

DONE AND ORDERED, at Jacksonville, Florida, this 3rd day of June, 2002.

/s/_____

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE